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No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,
PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion (R. 63–76) of the Court of Claims is reported in 95 C. Cls. 642.

JURISDICTION

The judgment of the Court of Claims was entered January 3, 1944 (R. 79). The petition for a writ of certiorari was filed April 21, 1944, the time for filing having been extended (R. 115), and was granted May 29, 1944. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 938,

939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. sec. 288 (b)).

QUESTION PRESENTED

Whether the Court of Claims correctly determined that the claim upon which the present suit is based did not arise under or grow out of the Treaty of July 30, 1863, as required by the Jurisdictional Act of February 28, 1929.

TREATIES AND STATUTES INVOLVED

The Northwestern Shoshone Treaty of July 30, 1863, appears in the record at pp. 43–44. The Eastern Shoshone Treaty of July 2, 1863, the Western Shoshone Treaty of October 1, 1863, the Shoshonee-Goship Treaty of October 12, 1863, and the Mixed Bands Treaty of October 14, 1863, appear in the record at pp. 40–42, 44–47, 47–49, and 49–51, respectively. The Jurisdictional Act of February 28, 1929, c. 377, 45 Stat. 1407, is set forth in the Appendix, *infra*, pages 31–33.

STATEMENT

Pursuant to the Act of February 28, 1929, c. 377, 45 Stat. 1407, which conferred jurisdiction on the Court of Claims to determine claims which petitioners might have against the United States "arising under or growing out of" the Northwestern Shoshone Treaty of July 30, 1863, and related treaties, petitioners brought suit in the Court of Claims on March 28, 1931, to recover

compensation for the alleged taking by the United States of lands claimed to have been secured to them by the Northwestern Shoshone Treaty (R. 1–24).

The Court of Claims found the facts as follows (R. 27–62):

The Shoshone Nation of Indians was located in the territories of Washington and Utah and, together with affiliated bands of Bannock Indians, roamed over and used as its abode a vast area of approximately 80,285,000 acres of land. The Shoshone and Bannock Indians claimed this area as their home to the exclusion of other tribes of Indians, and their claim was generally recognized by other tribes of Indians. The area they claimed as their home became a part of the states of Wyoming, Colorado, Utah, Idaho, and Nevada. Petitioners were a part of the several bands of the Shoshone Nation of Indians. The territory petitioners claim to have occupied as their home consists of 15,643,000 acres of land of which 6,067,000 acres are located in the southeastern part of Idaho, 6,389,000 acres in the northwestern corner of Utah, and 3,187,000 acres in the northeast corner of Nevada. The total population of the Shoshone and Bannock Indians in 1863 was about 9,700. Petitioners' population was between 1,500 and 1,800. (R. 27–28.)

In the 1850's and earlier the Government had practically no knowledge of the Indians who in-

habited the region which became southern Idaho, eastern Oregon, northern Nevada and northern Utah, their tribal distinctions, racial affiliations, or the specific areas occupied by particular tribes or bands of Indians. The Shoshone tribe always desired to be peaceful and friendly to the whites and to the Government. As a tribe they never engaged in war with the United States. Between 1849 and 1863, however, some of the Shoshones of the Northwestern Bands caused white emigrants and the Government considerable trouble by depredations and warlike acts because of the driving away of game and the destruction of food supply. The destruction of game and other sources of food reduced the Shoshones, particularly the Northwestern Bands, to a condition of practical starvation, making it necessary for them to "steal or starve". (R. 28–29.)

During this period the Government was supplying these Indians with little or nothing in the way of food supplies. Government agents and superintendents frequently went among these Indians, especially those inhabiting the routes of western travel, for the purpose of preserving peace, and as a means to that end gave the Indians presents which were gratefully received. These Indians professed friendship for the white people and the Government and showed a real desire for peace. They begged the Government agents for provisions and

supplies. Desiring to improve the condition of these Indians and to prevent attacks and depredations which were being committed on white emigrants by some of petitioner-bands of Indians because of the driving away of game and the destruction of their food supply, these agents constantly recommended to the Government that some provision be made to furnish them with the means to aid the Indians by giving them food and supplies, which would have the effect of bringing about peace and friendship with the Indians. They also urged the making of a treaty with the Shoshone tribe, which desired to be friendly, in order to provide for the Indians and for the safety of emigrants and settlers. The Commissioner of Indian Affairs and the Secretary of the Interior made similar recommendations. (R. 31–32.)

However, Congress took no steps to this end until 1862 when by the Act of July 5, 1862, 12 Stat. 512, 529, $20,000 was appropriated to defray expenses of making a treaty with the Shoshones, the Secretary of the Interior having reported to Congress that while the lands of the Indians were unfit for cultivation and would probably not be required for settlement for many years, a treaty was desirable because of "the control which the Government would thereby be enabled to exercise over them, by which additional security would be given to the settlers in the Territory, and to the

Overland Mail and Telegraph Lines" (R. 32–33).

On July 22, 1862, the Commissioner of Indian Affairs instructed the commissioners who had been appointed to negotiate a treaty with the Shoshones that the Government did not have sufficient knowledge to state definitely the boundaries of the country inhabited and claimed by the Shoshones but that they understood it was the country "through which lies the route of the overland mail, and the emigrant route * * * and it is mainly to secure the safety of travel along these routes that a treaty is desirable"; that while the treaty would not be negotiated "with a view to the extinguishment of the Indian title to the land," the United States' assurances of a desire for amicable relations and the payment of $20,000 in annuities should enable them to procure from the Indians agreement for the security of the overland mail and emigrant routes and "also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable"; and that the treaty should be so framed as to express that while on the one hand the United States, being aware of the inconvenience to the Indians resulting from the driving away and destruction of game along the route travelled by whites, was willing to compensate them fairly for the same, the Indians on the other hand acknowl-

edged the stipulated annuities as a full equivalent therefor and pledged to refrain from depredations and maintain peacable relations with the United States and their citizens (R. 33–35). Because the Shoshones were scattered over a vast extent of country, the treaty commissioners had difficulty in establishing contact with them and it became necessary to meet with their various bands under their various chiefs and headmen at several points (R. 35–39).

In 1863 treaties were concluded with various branches of the Shoshone tribe. The Eastern Shoshone Treaty of July 2, 1863 (R. 40–42) stipulated for peace and friendship between the Indians and the United States, the protection of the emigrant routes, the establishment of military agricultural settlements and military posts along those routes, and the protection of the telegraph and overland stage routes. It provided for the payment by the United States of annuities in articles suitable for the wants and condition of the Indians as compensation to the Indians for "the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements." The treaty also set forth a description of "the Shoshonee country, as defined and described by said nation." The Northwestern Shoshone Treaty of July 30, 1863 (R. 43–44) also stipulated for peace and friendship, incorporated all of the provisions of the Eastern Shoshone Treaty, and

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provided for the payment of annuities. Article IV thereof stated that "The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains." Similar treaties were made with the Western Shoshones, the Shoshonee-Goship Indians, and the Mixed Bands of Shoshone and Bannock Indians (R. 44–51). Treaty Commissioner James Duane Doty subsequently indicated the exterior boundaries of the country claimed by the Shoshones and the limits of the territory occupied by the various branches of the tribe on a map furnished by the General Land Office (R. 51, 55). Of the treaties Commissioner Doty wrote to the Commissioner of Indian Affairs, as follows (R. 54):

> The importance of these treaties to the government and to its citizens can only be appreciated by those who know the value of the continental telegraph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the gold discoveries in the north, which exceed in richness—at least in the quality of the gold—any discoveries on this continent.

Each of the treaties, except the Western Shoshone Treaty, was ratified by the Senate with the following amendment (R. 57):

> Nothing herein contained shall be construed or taken to admit any other or

> greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

The various tribes or bands of Indians accepted their respective treaties, as amended, except the Mixed Bands of Shoshones and Bannocks which had become so scattered that they could not be assembled for the purpose of obtaining their formal consent to the amendment of their treaty. As to the Western Shoshone Treaty, the Senate first voted to ratify it with a similar amendment but subsequently voted to reconsider action on the treaty and finally ratified the treaty without amendment except as to the amount of annuities to be paid under the treaty. (R. 57–58.)

By Act of February 23, 1865, 13 Stat. 432, Congress authorized the President to make treaties with the various tribes of the Utah Territory for "the absolute surrender * * * of their possessory right to all agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians" (R. 58–59). However, no further treaties were made with the Shoshone Indians except for a treaty of July 3, 1868, with the Eastern Bands of the Shoshone Tribe by which those bands of Indians ceded all lands claimed by them except a reservation of 3,047,730 acres in the Wind

River section of Wyoming which was set apart for their use and occupancy and for the use and occupancy of such other Indians as they might be willing to admit (R. 59).

Following the Treaty of July 30, 1863, the Northwestern Bands of Shoshone Indians became widely scattered over northern Utah and Nevada and southern Idaho. In 1873 the Commissioner of Indian Affairs appointed a commission to investigate all tribes and bands in this region, ascertain their number, and report on the possibility of gathering them upon one or more reservations where they could be more immediately under the care of the Government. After exhaustive investigation the commission reported that it had no trustworthy information as to the number of bands of Northwestern Shoshone Indians, and that a number of bands of these Indians had taken abode on various Indian reservations in Idaho, Wyoming, and Nevada. (R. 60.)

In Finding 15 the Court of Claims specifically found (R. 55–56) that in negotiating the five treaties with the various groups of Shoshone and Bannock Indians, the treaty commissioners and the Indians did not negotiate for acknowledgment by the United States of any exclusive Indian title, nor for any relinquishment by the Indians of any territorial claims they might have; that it was not the purpose of the treaty commissioners to acknowledge any territorial claims on the

part of the Indians, and the treaty commissioners made no attempt to ascertain accurately the territories which the Indians may have actually occupied, possessed and used to the exclusion of other Indians; and that the purpose of the United States and the treaty commissioners was to bring about peace and friendship with the Indians by making provision for annuities in articles suitable to their wants and condition in order that the routes of travel by the whites through the country occupied by the Indians and the white settlements therein might be free from attacks and depredations by the Indians.

In Finding 21 the court below found (R. 58) that prior to and at the time of the Northwestern Shoshone Treaty of July 30, 1863, the United States had not recognized a right of exclusive use, occupancy, and possession in the Northwestern Bands as against the United States to any of the territory within the Mexican cession and included in the country described in the treaty; that the treaty of July 30, 1863, contained no express or implied stipulation by the United States as to any Indian right, title, or interest in any land, and the United States never intended by the treaty to make any such stipulation; and that, on the contrary, the United States "has ever exercised dominion and complete ownership" over the territory claimed by the Northwestern Bands of Shoshone Indians.

Upon these findings the Court of Claims concluded that petitioners were not entitled to recover under the treaty of July 30, 1863, as for a taking by the United States of any portion of the 15,643,00 acres of land for which they sought compensation (R. 62). Accordingly, judgment was entered dismissing the petition (R. 79).

SUMMARY OF ARGUMENT

The Jurisdictional Act of February 28, 1929, c. 377, 45 Stat. 1407 (Appendix, *infra*, pp. 31–33) is limited to claims "arising under or growing out of" the Northwestern Shoshone Treaty of July 30, 1863. Cf. *Duwamish, et al., Indians* v. *United States*, 79 C. Cls. 530, 599–600, certiorari denied, 295 U. S. 755; *Coos Bay Indian Tribe, et al.* v. *United States*, 87 C. Cls. 143, certiorari denied, 306 U. S. 653; *The Wichita Indians, et al.* v. *United States*, 89 C. Cls. 378, 420. Petitioners cannot recover herein, therefore, unless the Treaty of July 30, 1863, is the source of the right of occupancy upon which the present suit is based.

The Court of Claims expressly found (R. 55–56, 58) that the primary purpose of the Treaty of July 30, 1863, was to establish peace and friendship between the Government and the Indians of the Shoshone Nation, and to free routes of travel from Indian molestation, in consideration of the payment of annuities, and that the Treaty was not intended to deal with the Indians' right of occupancy to the lands claimed by them. The

evidence amply supports this conclusion. Since the Treaty of July 30, 1863, neither acknowledged nor extinguished petitioners' asserted right of occupancy, the claim sued upon here is not one "arising under or growing out of" the Treaty.

ARGUMENT

THE COURT OF CLAIMS CORRECTLY DETERMINED THAT THE CLAIM UPON WHICH THE PRESENT SUIT IS BASED DID NOT ARISE UNDER OR GROW OUT OF THE TREATY OF JULY 30, 1863, AS REQUIRED BY THE JURISDICTIONAL ACT OF FEBRUARY 28, 1929

A. *The Jurisdictional Act of February 28, 1929, requires that petitioners' claim arise under or grow out of the Treaty of July 30, 1863.*—The present suit brought in the Court of Claims cannot be maintained unless petitioners' claim for compensation is one "arising under or growing out of" the Northwestern Shoshone Treaty of July 30, 1863, as required by the Jurisdictional Act of February 28, 1929 (Appendix, *infra*, pp. 32–34). The lands claimed to have been taken by the United States, therefore, must be held by right of occupancy derived from the Treaty, and not merely by right of occupancy based upon immemorial possession, or so-called Indian title. Cf. *United States* v. *Creek Nation*, 295 U. S. 103; *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308; *Assiniboine Indians* v. *United States*, 77 C.

Cls. 347, appeal dismissed and certiorari denied, 292 U. S. 606; *Crow Nation* v. *United States,* 81 C. Cls. 238; *Duwamish, et al., Indians* v. *United States,* 79 C. Cls. 530, 599–600, certiorari denied, 295 U. S. 755. The language of the statute is clear and unambiguous. Congress plainly did not intend to authorize the Court of Claims to take jurisdiction of claims based solely upon immemorial possession, and not having their source in the Treaty. When Congress intends to authorize recovery on such claims, its legislation usually makes explicit provision therefor. Cf. *Coos Bay Indian Tribe, et al.* v. *United States,* 87 C. Cls. 143, certiorari denied, 306 U. S. 653; *The Wichita Indians, et al.* v. *United States,* 89 C. Cls. 378, 400; *The Indians of California* v. *United States,* 98 C. Cls. 583. Thus in the *Coos Bay* case, the jurisdictional act expressly permitted suits "arising under or growing out of the original Indian title, claim, or rights of the said tribes". Moreover, when Congress permits suits on claims based on immemorial possession, it is customary that the statute should define with reasonable exactness the area within which aboriginal rights may be asserted, thus limiting the extent of the United States' potential liability. The jurisdictional act in the *Coos Bay* case circumscribed by metes and bounds the area within which claims of original occupancy rights might be asserted. In *The Indians of California* case, the jurisdictional act

authorized recovery on claims for the loss of lands expressly delimited in the eighteen, unratified treaties with the California Indian tribes.[1]

Since the Jurisdictional Act extends only to occupancy rights derived from the Treaty of July 30, 1863, the taking by the United States of any aboriginal rights petitioners may have had in these lands can not be made the basis of recovery in this suit. To construe the Jurisdictional Act as permitting recovery on claims based solely on aboriginal title would expose the United States to a potential liability which Congress did not show

[1] Although the United States has several times submitted to suit on claims based solely on aboriginal title, it has not yet been determined that the United States is under any legal liability to compensate an Indian tribe for a deprivation of its aboriginal rights. The *Coos Bay* and *The Wichita Indians* cases, *supra*, denied recovery for want of proof of the claimed aboriginal titles. In *The Indians of California* case, the Court of Claims granted a recovery but this was on the basis of a provision in the jurisdictional act declaring that "the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief." *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, *Beecher* v. *Wetherby*, 95 U. S. 517, and similar cases, which declare that the United States' power over claimed Indian titles is plenary and its extinguishment of such titles raises no justiciable issues, make it problematical whether a deprivation of an aboriginal title will ground a legal liability on the part of the United States to make compensation, even where it has consented to be sued on such a claim. Since the Jurisdictional Act here involved is limited to treaty claims, the question is not reached in this case.

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that it intended to assume.[2] Not confining themselves to the meager territorial descriptions contained in the Northwestern Shoshone Treaty of July 30, 1863, petitioners set forth in their petition in the Court of Claims an elaborate definition of the territory claimed to have been held by immemorial occupancy (R. 17). Petitioners claim 6,255,000 acres west of Raft River—over one-third of the total number of 15,643,000 acres claimed in this suit—which admittedly are not even referred to in the Northwestern Shoshone Treaty. And, in their petition for a writ of certiorari, petitioners suggest that even though the Treaty of July 30, 1863, does not fix the area of their claimed domain, they should be permitted to submit proofs thereon. We submit, however, that Congress clearly intended that the Treaty

[2] "Tribal Indians claim by right of occupancy such vast and unlimited areas of lands * * * that had it ever been the political policy of the Government to accord them the same proprietary right that attaches to a title superior to that of occupancy, and open the courts to suits as and for their taking when thrown open to public settlement by the United States, Congress and the courts would have left open no doubts on the subject.

"Indian special jurisdictional acts, of which there are many, exemplify the established rule that resort to the courts by tribal Indians has always been restricted to adjudication of treaty rights and losses suffered by acts of Congress with respect thereto." *Dumarish, et al., Indians* v. *United States*, 79 C. Cls. 530, 599–600, certiorari denied, 295 U. S. 755.

alone should determine the extent of the liability assumed by the United States.[3]

B. *The Court of Claims correctly determined that petitioners' claim did not arise under or grow out of the Treaty of July 30, 1863.*—Indian right of occupancy is a question of fact depending on possession of a definite area of land to the exclusion of other tribes. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 399, 345. By the same token, whether the United States by treaty intended to acknowledge Indian right of occupancy to lands claimed by them is also a question of fact, at least where, as here, the answer depends upon consideration of the purpose of the Treaty, as disclosed by its historical background and subsequent practical construction by the parties.

The Northwestern Shoshone Treaty contained no provision whereby the United States acknowledged that petitioners had title by right of occupancy to the lands they claimed. Nothing in the circumstances surrounding the making of the Treaty suggests that the United States contemplated or the Indians understood that the Treaty

[3] The letter of the Secretary of the Interior proposing the legislation (S. Rep. 519, 70th Cong., 1st Sess., quoted in Petitioners' Brief, p. 17) is not inconsistent with the construction we place upon the Act. His characterization of petitioners' claims as being asserted "under the treaties mentioned" can hardly be regarded as equivalent to a considered judgment that such claims were derived from rights acknowledged by the Shoshone Treaties.

would deal with the question of the Shoshones' Indian title to any definite area of land. Thus, although in 1861 the Superintendent for the Utah Territory had advised the Commissioner of Indian Affairs that the Shoshones were willing to cede their claimed territory (R. 31), the Secretary of the Interior in the following year wrote to the House Committee on Indian Affairs, which was considering the desirability of entering into treaties with the Indians of Utah Territory with a view to purchasing their lands, as follows (R. 33):

> The lands owned by the Indians are, most of them, unfit for cultivation, and it is not probable that any considerable portion of them will be required for settlement for many years. The principal inducement to make treaties with those tribes is the control which the Government would thereby be enabled to exercise over them, by which additional security would be given to settlers in the Territory, and to the Overland Mail and Telegraph Lines.

And, following the Act of July 5, 1862, 12 Stat. 512, 529, appropriating $20,000 to defray the expenses of negotiating a treaty with the Shoshones, the Commissioner of Indian Affairs, on July 22, 1862, instructed the treaty commissioners that (R. 34):

> It is not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the land, but it

> is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to their wants for which you are authorized to stipulate, you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves * * *

In accordance with these instructions, the provisions of the Treaty dealt only with the question of securing protection for routes of travel used by whites from Indian molestation in return for payment of annuities. The precise language used in the Shoshone treaties is noteworthy. The territorial boundaries set forth in the Northwestern Shoshone Treaty were those of "the country claimed by Pokatello, for himself and his people" (R. 44). The Eastern Shoshone Treaty similarly identified the Eastern Shoshone country "as defined and described by said nation" (R. 41). Nowhere in any of the Treaties did the United States acknowledge that the Shoshones owned by immemorial possession the lands described by the Treaties in these general terms.

Subsequent to the Treaty, the Northwestern Shoshones became widely scattered over northern Utah and Nevada and southern Idaho. In 1873 the commission appointed to investigate all the tribes and bands in this region was unable to obtain any reliable data as to the location or population of the Northwestern Shoshones. The commission found that some few (about 17) had gone to the Wind River reservation in Wyoming, which had been set apart in 1868 for the Eastern Shoshones; that others (about 400) had gone to the Fort Hall Indian reservation in Idaho; and that a number (about 300) had been assigned a small reservation in northeastern Nevada from which they were subsequently removed to the Western Shoshones' Duck Valley reservation in southwestern Idaho and northern Nevada (R. 60), making a total of about 700. By the Act of February 23, 1865, 13 Stat. 432, Congress authorized the President to make treaties with the various tribes of the Utah Territory for "the absolute surrender * * * of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians" (R. 58–59). Although the United States pursuant to this Act entered into the Treaty of July 3, 1868, with the Eastern Shoshones by which the latter ceded all the lands claimed by them except the 3,047,730

acres in the Wind River section of Wyoming which was set apart for their use and occupancy, no further treaties were made with the Northwestern Shoshones (R. 59). On the contrary, the United States always exercised complete dominion over the area petitioners claim to have owned by immemorial possession (R. 58).[4]

After considering the available evidence, the Court of Claims found that the Treaty of July 30, 1863, was not negotiated for the purpose of acknowledgment by the United States of petitioners' Indian title to the area claimed by them; that the treaty commissioners were not instructed and did not attempt to conduct any negotiations of this nature; and that, on the contrary, the primary purpose of the Treaty was to bring about peaceful and amicable relations between the United States and the Indians of the Shoshone Nation by making provision for the payment of annuities in goods and supplies so that routes of travel through the portion of the country occupied by the Shoshones might be free from attacks and depredations (R. 55–56). The Court of Claims also found that when the Treaty was made, the United States

[4] Petitioners' identity as "Northwestern Bands of Shoshone Indians" was practically lost in the 1880's (see R. 61–62). Extensive inquiry has failed to disclose even an estimate as to the present population of petitioner-bands of Indians. In event of recovery herein a special roll would have to be prepared to determine the identity and number of Indians comprising petitioner-bands.

had not recognized petitioners as having any Indian title to any of the territory within the Mexican Cession and included in the lands described in the Treaty by Pokatello and now claimed by petitioners; that the Treaty of July 30, 1863, contained no express or implied recognition by the United States that petitioners had any right or interest in any lands; that the "matter of Indian use and occupancy rights or the extinguishment of any claim or right which the Indians might make or have to such use and occupancy * * * did not enter into the negotiations and was left out of consideration in the drafting and making of" the Treaty; and that the United States has exercised dominion and complete ownership over the lands for which petitioners now seek compensation (*id*).

Petitioners contend that these findings are wrong as a matter of law, and that this Court should itself weigh the evidence and determine that the Treaty of July 30, 1863, was intended to and did acknowledge the Northwestern Shoshones' Indian title to the lands described therein. We submit, however, that the record furnishes ample support for the conclusion reached by the Court of Claims, and that petitioners have advanced no basis upon which this Court would be warranted in disturbing the findings made by the court below. Cf. *United States* v. *Sisseton and Wahpeton Bands of Sioux Indians*, 208 U. S. 561, 566; *United States* v. *Omaha Tribe of Indians*, 253 U. S. 275, 281, 283.

United States v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, holding that the traditional policy of the United States has been to concede the possible existence of Indian rights of occupancy based on immemorial possession within the Mexican Cession as well as elsewhere in this country, does not support petitioners' contentions. That case establishes only that petitioners could have had, as they claim, the right of occupancy to all of the lands involved, even though the greater part of the lands is within the Mexican Cession. The *Santa Fe* case has no bearing upon the question here, namely, whether the Treaty of July 30, 1863, was intended to recognize petitioners' Indian title to the lands described therein. Petitioners argue that the Treaty of July 30, 1863, proceeded in recognition of rather than in opposition to petitioners' claimed right of occupancy, and the Treaty must, therefore, be held as a matter of law to have acknowledged their claimed right of occupancy. In the *Santa Fe* case, also, the Railroad Land Grant proceeded in recognition of and not in opposition to the Walapai Indians' claimed right of occupancy. This Court held only that the Walapai Indians were entitled to prove, if they could, that they had the Indian right of occupancy claimed by them. So here the burden rested upon petitioners to prove that the Treaty of July 30, 1863, acknowledged their Indian right of oc-

cupancy. This issue of fact was fully contested in the Court of Claims and was resolved against petitioners. A favorable finding of fact on this issue was an essential prerequisite to petitioners' recovery. Cf. *Choctaw Nation* v. *United States,* 318 U. S. 423, 432.

There can be no doubt of the authority of the United States to make a treaty with an Indian tribe without conceding the validity and extent of the Indian title the tribe may claim. The Government has done so many times with respect to the tribes of the Far West. Cf. Cohen, *Handbook on Federal Indian Law* (1942), pp. 62–63. On many occasions it has made treaties with several tribes which asserted conflicting or overlapping claims to the same territory. See Royce, *Indian Land Cessions* (1899), pp. 676–888; *The Wichita Indians, et al.* v. *United States,* 89 C. Cls. 378, 420–421. It cannot be said, therefore, that as a matter of law the United States may not enter into a treaty which is wholly neutral with respect to the validity of territorial claims made by the Indians. Territorial descriptions contained in a treaty are not in themselves of controlling significance as to its purpose. All of the relevant factors must be considered. When the issue is, as here, whether a treaty has recognized or acknowledged a claimed tribal right of occupancy, the effect to be given the presence of territorial descriptions in the treaty

depends upon all the circumstances surrounding its adoption. Cf. *Choctaw Nation* v. *United States,* 318 U. S. 423, 432. The boundaries mentioned in the Northwestern Shoshone Treaty were of the country "claimed" by Pokatello (R. 44), and those stated in the Eastern Shoshone Treaty were of the Shoshone country "as defined and described by said nation" (R. 41). These territorial descriptions purported to be nothing more than representations by the Indians as to the extent of their territorial claims. Moreover, the descriptions were given in very general terms, and the Northwestern Shoshone Treaty failed to describe the 6,255,000 acres lying west of the Raft River, which petitioners now contend was also part of the territory owned by them. These territorial descriptions are obviously lacking in the preciseness normally to be found in treaties intended to acknowledge Indian rights of occupancy. The record discloses what we believe and the Court of Claims found, to be the proper explanation for the presence of territorial descriptions in the Shoshone Treaties. As the court below stated (R. 74), "The purpose of obtaining a description of territory from the Indians was, as the [Commissioner of Indian Affairs'] letter of instructions of July 22, 1862, stated, to obtain as much information as possible as to what territory the Indians *claimed,* because the Government had no information in that regard from the Indians themselves,

and very indefinite information otherwise as to the territory which they occupied."

Petitioners stress (Br. 44–47) the amendment made by the Senate in ratifying the Treaty, as follows (R. 57):

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

The Court of Claims properly held, we submit, that: "Without the amendment the treaty did not admit or deny aboriginal occupancy, nor did it acknowledge the right of exclusive use and occupancy as against the United States. The amendment therefore added nothing to the treaty in this respect." (R. 74.) Manifestly, the amendment preserved the right of the United States to deny that the Shoshones had any right or title in lands within the Mexican Cession "other or greater" than what they had under Mexican law, and thus sought to make Mexican law determinative of the Shoshones' claimed right of occupancy.[5] In accordance with obligations assumed under

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[5] Like *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, the Senate amendment involved the problem of whether the United States' historic policy conceded the existence within the Mexican Cession of tribal rights of occu-

the Treaty of Guadalupe Hidalgo, the amendment safeguarded such property rights as the Indians might have under Mexican law. It was not concerned, however, with whether the Shoshones had any right of occupancy as they claimed. Like the treaty itself, the Senate amendment neither recognized nor extinguished petitioners' claimed tribal right of occupancy. It is wholly immaterial, therefore, on the question whether the Treaty of July 30, 1863, gave rise to the right of occupancy upon which the present suit is based.

That petitioners' asserted right of occupancy may not have been extinguished by, and may have survived, the Treaty of July 30, 1863, is equally inconsequential here. If the Treaty did not affirmatively recognize and acknowledge the petitioners' right of occupancy, appropriation by the United States of the lands involved did not give rise to a claim "arising under or growing out of" the Treaty within the meaning of the Jurisdictional Act, but only to a possible claim arising under or growing out of their asserted right of occupancy. Since Congress has not consented to be sued by petitioners on a claim arising out of

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pancy based on immemorial possession. Although this Court held in the *Santa Fe* case that such rights could exist within the Mexican Cession under the laws of the United States, it recognized in its opinion (pp. 345–346 of 314 U. S.) that, as the Senate amendment indicates, the question was highly debatable, at least until the decision in *Cramer* v. *United States*, 261 U. S. 219.

their asserted Indian title, a suit based upon such a claim cannot now be maintained.

Petitioners rely heavily (Br. 37–41) on the Court of Claims' determination that, by the Fort Laramie Treaty of September 17, 1851, the United States acknowledged the title of several Indian tribes to the respective territories described in that treaty. *Fort Berthold Indians* v. *United States,* 71 C. Cls. 308; *Assiniboine Indians* v. *United States,* 77 C. Cls. 347, appeal dismissed and certiorari denied, 292 U. S. 606; *Crow Nation* v. *United States,* 81 C. Cls. 238.[6] The Fort Laramie Treaty and the Treaty here involved, however, are to be distinguished on a factual basis. In the former case, in view of its provisions and all the circumstances leading to and following upon the treaty, the Court of Claims found that the treaty was intended to acknowledge claimed tribal rights of occupancy; in the present case, it could not so find. The Fort Laramie Treaty involved an intention by the parties to put an end to internecine tribal warfare as well as to establish peace and amity between the tribes and the United States and to secure protection for routes of travel, etc. The Treaty Commissioners and the several tribes met in council and after extended deliberations

[6] Compare *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 347–349, where the court said the Fort Laramie treaty "did not alter the status" of the lands therein described or "create technical reservations as have many other treaties and acts of Congress."

agreed upon the respective boundaries of the lands claimed by the several tribes. The tribes promised not to encroach upon each other's territory, and the United States agreed not only to respect the tribes' assigned territories, but also to protect them in their occupancy thereof. The Treaty Commissioners acted under specific instructions (71 C. Cls. at 312) "*to establish for each tribe some fixed boundaries* within which they should stipulate generally to reside, and each should agree not to intrude within the limits assigned to another tribe without its consent." (Italics added.) In the treaty (4 Kappler 1065) the tribes severally "recognize" and "acknowledge" their respective territories, the boundaries of which were clearly fixed. Had the treaty not established the respective territories of the several tribes, it could hardly have succeeded in its purpose to establish peace and friendship among the Indians and between them and the United States. As the Court of Claims held, "In what other way and for what other consideration could the commissioners have successfully accomplished their designed purpose than a governmental recognition of certain well-described lands as territory belonging to the Indians by right of occupancy" (71 C. Cls. at 331). On the other hand, in the case of the Northwestern Shoshone Treaty there was a complete absence of any purpose on the part of the United States to define and establish the territory subject to the North-

western Shoshones' claimed right of occupancy. The boundaries of the country claimed by them were not complete nor defined with precision. The primary object of the treaty was to obtain peace and friendship with the Indians, and freedom from Indian molestation for routes of travel, by payment of annuities.

Finally, the rules for the construction of Indian treaties and agreements, upon which petitioners rely (Br. 56–60), do not warrant a different construction from that made by the Court of Claims in this case. While Indian treaties are to be construed, so far as possible, in the sense in which the Indians understood them, and in a manner which is compatible with the full obligation of the United States to protect the interests of a dependent people, they "cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation* v. *United States,* 318 U. S. 423, 432. Cf. *Creek Nation* v. *United States,* 318 U. S. 629, 634, 640; *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 500; *United States* v. *Choctaw and Chickasaw Nations,* 179 U. S. 494, 500. In this case, as the Court of Claims found (Fdgs. 15, 21, R. 55–56, 58), there was no understanding on the part of the parties to the Treaty of July 30, 1863, that the treaty should acknowledge petitioners' claimed right of occupancy. Cf. *Choctaw Nation* v. *United States,* 318 U. S. 423, 432.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims was correct and should be affirmed.

Respectfully submitted.

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NOVEMBER 1944.

APPENDIX

The Act of February 28, 1929, 45 Stat. 1407, reads as follows:

> CHAP. 377.—An Act Conferring jurisdiction upon the Court of Claims to hear, adjudicate, and render judgment in claims which the northwestern bands of Shoshone Indians may have against the United States.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685—2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863—2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.
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> SEC. 2. That any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five

years from the date of the approval of this Act; and such suit shall make the northwestern bands of Shoshone Indians party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claims under contract with the northwestern bands of Shoshone Indians, approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided by law. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys for said Indians to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians.

SEC. 3. That in said suit the Court of Claims shall also hear, examine, consider, and adjudicate all claims which the United States may have against the said northwestern bands of Shoshone Indians. Any payment which may have been made by the United States, including gratuities for the benefit of any band or bands of said Indians or for their support and civilization, shall not operate as an estoppel, but may be pleaded as a set-off in said suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States.

SEC. 5. The Court of Claims shall have full authority by proper process and orders to bring in and make parties to such suit any and all persons deemed by it necessary

or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he or some attorney from the Department of Justice to be designated by him is hereby directed to appear and defend the interests of the United States in such case.

SEC. 7. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorney or attorneys employed by said northwestern bands of Shoshone Indians, or any of them, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said bands.

SEC. 8. The balance of the proceeds of all amounts, if any, recovered for said northwestern bands of Shoshone Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree and shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians.

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